No. 8953

4

United States
Circuit Court of Appeals
For the Ninth Circuit

PHOENIX BLUE DIAMOND EXPRESS, a Corporation,
Appellant,
vs.
DORRIO MENDEZ,
Appellee.

PHOENIX BLUE DIAMOND EXPRESS,
Appellant,
vs.
LORETO LUNA,
Appellee.

PHOENIX BLUE DIAMOND EXPRESS,
Appellant,
vs.
P. N. ESTRADA, Administrator of the Estate of Jesus Valenzuela, Deceased,
Appellee.

PHOENIX BLUE DIAMOND EXPRESS,
Appellant,
vs.
FELIX LUGO, by his Guardian Ad Litem, Estavan Sworez,
Appellee.

PHOENIX BLUE DIAMOND EXPRESS,
Appellant,
vs.
ANDRES ACUNA, by his Guardian Ad Litem, Delores Acuna,
Appellee.

Brief of Appellant

Upon Appeals from the District Court of the United States for the District of Arizona.

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Attorneys for Appellant.

REPUBLIC AND GAZETTE PRINTERY, PHOENIX

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

TABLE OF CASES AND AUTHORITIES
(Continued)

SUMMARY OF THE ARGUMENT

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Upon Appeals from the District Court of the United States for the District of Arizona.

SPECIFICATION OF ERRORS NOS. I AND II.

These specifications are argued in Brief of Appellant, Pages 18 to 51, and in Brief of Appellees, Pages 5 to 24.

The statement on Page 7 of the brief of appellees, "the broad issue of fact, aside from the legal question of the sufficiency of the evidence argued in appellant's brief, was whether appellant's truck was on a regular trip on appellant's business at the time of the accident, or whether that trip had been completed *and the truck was then being used by Joe Smith on a mission of his own at the Washington Tavern,*" is not a fair statement of the broad issue of fact argued in appellant's opening brief. It is true appellant contends that appellant's truck had passed Washington Tavern and reached the City of Phoenix, thus completing its regular trip from Tucson, Arizona, to Phoenix, Arizona. On the other hand, there is no question under the evidence of the truck being used by Joe Smith on a mission of his own to Washington Tavern, if by the words "being used" is meant Joe Smith was driving the truck. It is true appellees contend that Joe Smith was driving appellant's truck enroute to Phoenix on a regular trip, and that he had not previously completed the trip by driving the truck into Phoenix, Arizona. The statement by appellees that appellant tried the case on the theory Joe Smith had completed the trip, is correct; and the further statemnet by appellees that Joe Smith thereafter had taken appellant's truck, without its knowledge, on a mission of his

own to the Washington Tavern and upon attempting to return to Phoenix met with the accident, is only correct to the extent that appellant contends that the ruck had reached Phoenix, and hereafter any use it was being put to was a mission on the part of the operator of the truck and his associates, wholly outside of any agency between the operator of the truck and appellant, and wholly without the scope of the employment of Joe Smith. There is not in the entire record the statement of any witness that Joe Smith was driving the truck at the time of the accident, or at any time on the night of December 31, 1937, or the night hours of January 1, 1938, after he had first parked the truck, headed East on Madison Street, between 3d and 4th Streets, in Phoenix, Arizona. There are in the entire record, we submit, no circumstances from whiich an inference could properly be drawn that Joe Smith was driving the truck on the evening of December 31, 1937, or the night hours of January 1, 1938, at the time of the accident, or at any time after he had first parked the truck headed East on Madison Street, between 3d and 4th Streets, in Phoenix, Arizona. There is no evidence to support the contention of appellees that when Joe Smith reached the Washington Tavern, on his regular trip from Tucson to Phoenix, on the night of the accident, he parked appellant's truck on the North curb of Washington Boulevard. There are no circumstances warranting an inference of such fact, nor are there facts warranting an inference that thereafter Joe Smith re-

sumed his employment and his journey to Phoenix and, before reaching his destination, met with the accident in question. Appellees' statement is not evidence. Proof of negative facts never establish an affirmative. Conceding that appellant's truck was headed West and parked along the North curb of Washington Boulevard, that is the principal fact to which appellees may point. That fact does not prove that Joe Smith parked appellant's truck there, much less does it prove or warrant the inference that he parked it there while proceeding on a regular trip from Tucson to Phoenix, Arizona. We quote from the case of Challis vs. Woodburn, cited by appellees (Ct. of Appeals of Kansas, Northern Department, E. D. Jan. 13, 1896) 43 Pac. 792, at 795:

> "The very utmost that can be said of the evidence in this case is that it possibly raises a suspicion against Lamberson, but it does not go even that far as to the plaintiff, Challis. We cannot agree with counsel for the defendants in error that there are many remarkable and suspicious facts and circumstances proven in this case. His construction placed upon the testimony is ingenious, but not tenable; and we think it arises from his zeal in behalf of his clients, and the language used in his arguments is much stronger than is warranted by the facts in this case."

What the court there said may be accurately and with force applied to the statements and the argument of appellees.

On the other hand, Joe Smith testified:

> "it was a quarter after eleven or eleven thirty the night of December 31, 1937, when I parked the truck on Madison Street. I was at the Ritz twenty or thirty minutes. From the Ritz I went back to the truck with Hollis and these other fellows * * * When we got to the truck they all started arguing who was going to drive the truck. I got in the sleeper. The truck was moved from Madison Street where I had parked it. I did not move the truck or drive it away. I don't know who did." (T. R. 128).

Again, Joe Smith testified:

> "It was driven to, or the next place I knew where it was, was 16th and Washington, to the place there known as the Gateway, another drinking place that used to be called the Old Red Rooster. All of the others got out of the truck and went into the Red Rooster; I did not get out, I stayed in the sleeper; I don't know how long they were gone. I was sleeping most of the time. I cannot say if all that left the Ritz came back because I never noticed very closely. They all got in the truck again and started and went to the Washington Tavern. There they all got out and went into the Washington Tavern. I stayed in the sleeper a few minutes and decided I'd get out and get a drink myself, and I did. I was in the Washington Tavern for fifteen or twenty minutes or half an hour. I do not know the exact time; then I went back in the sleeper in the truck and I went to sleep." (T. R. 128-129).

Further, Joe Smith testified:

> "After I left the Washington Tavern and went back to the truck and got in and went to sleep. I remember the truck starting up again. I don't know which way it went. The next thing I knew was when the truck was turning over. I had not at any time, after parking the truck at 3rd and Madison Street, driven it prior to the wreck. I was not driving the truck at the time of the wreck. I do not know who was driving it. I was drunk."

The testimony of Harry Davis, a witness for appellees, and of whose testimony appellees make much and stress, definitely corroborates Joe Smith's testimony. This witness Davis testified:

> "I was at the Washington Tavern about the hour of one o'clock in the morning of January 1, 1938 * * * When I arrived at Washington Tavern I saw a Phoenix Blue Diamond truck parked on the north side of Washington Boulevard headed west toward Phoenix * * * I went to that truck that night and walked around it. The sleeper door on the truck was partially open and I am sure I saw Joe Smith lying in it. I tried to wake him up. I said 'Come on Joe, I will buy you a drink,' and no answer. I hollered at him a few more times and he would just mumble something about a dock. I had gone to the Tavern to get a drink and finally Bob Brazee, the fellow with me, said, 'Let's go, he is all right, let him alone,' so we left the truck and went to the Tavern and it was too late to get a drink." (T. R. 155-156).

It should take more than suspicion to prove the plaintiff's case. Joe Smith testified he had not had a drink until he got to Phoenix and parked the truck on Madison Street (T. R. 127-128). Thereafter he was never again on the business of appellant. In all of his drinking he was on his own escapade.

In the case of Baker vs. Maseeh, (Ariz. Mch. 14, 1919) 20 Ariz. 201, 179 Pac. 53, the court said:

> "In this jurisdiction, however, the question presents a case of first impression, and, for the reasons above given, we have adopted the more liberal rule, and we hold that proof of ownership is *prima facie* evidence that the driver of a vehicle causing damage by its negligent operation is the servant or agent of the owner and using the vehicle in the business of the owner."

Without hesitancy we acknowledge the existence of the presumption in the instant case. What is the effect of the presumption? In the same case of Baker vs. Maseeh, supra, the court says:

> "The presumption of use and control arising from proof of ownership is not conclusive. It has the effect, however, to cast the burden of proof on the owner to show, if he can, that the negligent driver was not his servant or agent, or, if such servant or agent, he was not at the time using the vehicle in the business of the owner."

In Otero v. Soto, 34 Ariz. 87, 267 Pac. 947, the court said:

> "If, therefore, there be evidence in the case that the truck was not being used in Otero's business, which on the record as it stands cannot be legally disregarded, the presumption alone cannot be considered to raise an issue of fact * * * If, on the other hand, even though there be no affirmative evidence supporting the presumption, the evidence contradicting it is of such a nature that it could be legally disregarded, the presumption would be sufficient to take the question of use to the jury."

This, of course, is equivalent to the statement that the presumption retires in the face of evidence.

In the case of Peters vs. Pima Mercantile Co., 42 Ariz. 454, 27 Pac. (2d) 143, the Supreme Court of Arizona said, with reference to the presumption under discussion:

> "This was only prima facie so and the force thereof was completely overcome when the testimony of J. J. McNeil and his son disclosed that the latter was not following his instructions to go to the city and get the merchandise when he made the side trip of about two miles to the hospital to see about the dog."

So in this case the force of the presumption was completely overcome when it was proved by the testimony of Joe Smith, William J. Evans, Calvin Hollis and Alex Brady, that Joe Smith had reached Phoenix on a regular trip before undertaking with

others, some one to him unknown driving the truck, the unfortunate New Year's celebration and, we may add, by the testimony of the witnesses of appellees, particularly the testimony of Harry Davis, previously referred to in this brief. The circumstances are such as to make the further language found in the opinion in Peters vs. Pima Mercantile Co., supra, apropos to the instant case, and such language demonstrates the correctness of the theory of appellant. We quote:

> *"The only way appellee could be held liable under such circumstances would be to hold that the law is that the mere fact that Sidney's employment covered the driving of the truck, or that he was in possession of and using it when it caused the injury to appellant, or both, is all that is necessary to make appellee responsible for his acts. To do this, however, would be to overlook entirely the essential factor that the employee must be prosecuting the work he was engaged to perform before his employer becomes liable for injuries his negligent use of his employer's car causes a third person."*

This Court, in the case of Department of Water and Power vs. Anderson, decided the 22d day of March, 1938, 95 Fed. (2d) 577, quoted and relied upon by appellees at Pages 9, 11, and 26 of their brief, in which case the opinion was written by Circuit Judge Haney, we quote therefrom as follows:

> "Ordinarily, one who entrusts his automobile to another is not negligent and is not liable for the negligence of the latter * * *. The rule

is based on the decisions which are almost unanimous in holding that an automobile is not ordinarily a dangerous instrumentality * * *.

Under the doctrine of respondeat superior, a master is liable for the tortious acts of his servant, if done in the course of the servant's employment, even though such acts may have been done without the knowledge or authority of the master, or in disobedience of the master's orders * * *.

That general rule is applicable to cases where the servant is operating an automobile. As a congener to this rule, it is generally held that the master is not liable for injuries or damage resulting from the negligent operation of his car by a servant while the latter is using it for his own purposes without the owner's permission or consent * * *. The same rule applies although the master has consented to the use of the automobile by the servant * * *.

The presumption or procedural rule of law is that the opposing party then has the burden of going forward with the evidence, or, in simple terms, the court, in effect, says to the opposing parties: 'Orderly procedure now requires that you introduce evidence, either showing, or from which it may be inferred what, the ultimate fact is; if you fail or refuse to introduce such evidence, you do not comply with the orderly procedure, and as a consequence the ultimate fact will be found to be that which the evidentiary facts now indicate it to be. The 'presumption is not the fact itself, nor the inference itself, but the legal consequence attached to it.' 5 Wigmore on Evidence, 2d Ed., 451, Section 2491. It is only

a procedural rule of law, placing on the opponent the burden of going forward with the evidence * * *. If the opposing party complies with the presumption or procedural rule of law, and introudces evidence, the presumption thereafter has no application, or function, and disappears entirely * * *.

Finally, a third rule is that proof of ownership is sufficient to support an inference, and that a presumption is applicable. This Court is committed to that view. D'Aleria v. Shirey, 9 Cir., 286 F. 523. Under this view proof of ownership without more, calls into operation the presumption, (or procedural rule), which requires submission of evidence as to the ultimate fact by defendant, and if defendant fails to submit such evidence, or such evidence is not submitted by plaintiff, then the court instructs the jury to find that the automobile was being operated by the third person as the agent or servant of the defendant, and within the course of his employment. The second and third rules differ, only when there is proof of ownership, without more, in that under the former, the jury may draw the inference, but is not required to do so, and under the latter rule, the jury is required to draw the inference. Foundation Co. vs. Henderson, 5 Cir., 264 F. 483 * * *.

Under the third rule, if defendant submits evidence as to the ultimate fact, the requirement of the presumption is fulfilled, and it thereafter is inapplicable, or, as stated by some authorities, the presumption disappears. The inference, however, is not affected in any way, except as

any other fact, by the effect of the evidence adduced, in the jurors' minds."

"After presentation of evidence leading to an ultimate fact contrary to the one which may be inferred from proof of ownership, the plaintiff may introduce further evidence leading to the ultimate fact which may be inferred from proof of ownership. Whether plaintiff does or does not, the duty of the trial court with respect to direction of a verdict is the same as in other actions * * *. In the instant case, appellant presented evidence on the issue of what Nicoll was actually doing at the time of the accident, thus removing itself from consequences of a compulsory finding against it, pursuant to the presumption. Without relating the evidence we say that in our opinion the evidence was so overwhelming to the effect that Nicoll was not acting in the furtherance of appellant's business, as to leave no room to doubt the fact. The verdict cannot, we believe, be sustained on that ground * * *. The amount of evidence which is sufficient to prevent direction of a verdict 'is not a mere scintilla of evidence' (Citing Authorities) but substantial evidence."

Appellees did not rely on the presumption arising from proof of ownership, but tendered evidence relative to the acts, facts and circumstances. Appellant presented direct evidence, as well as circumstantial evidence, that the truck was neither being driven by an employee of appellant nor in the furtherance of its business, and we urge that all of the evidence, both of appellees and appellant, show that all business had ceased and the actors in the tragedy out of

which this litigation arose, were on a New Year's frolic, we may say, a drunken ogre. Under these circumstances, as stated by Judge McAllister in Peters v. Pima Mercantile Co., supra, the force of the presumption was completely overcome and, as stated by Judge Haney in Department of Water and Power vs. Anderson, supra, "the requirement of the presumption is fulfilled and it thereafter is inapplicable or, as stated by some authorities, the presumption disappears."

Counsel for appellees cite the case of Gunning vs. Cooley, 281 U. S. 90, 94, 50 S. Ct. 231, 233, 74 L. Ed. 720, on Page 11 of their brief. We have no quarrel or disagreement with the law announced or the language used by the court. Its application to the instant case is the only matter of difference. We quote from the opinion:

> "When, on the trial of the issues of fact in an action at law before a Federal Court and jury, the evidence, with all the inferences that justifiably could be drawn from it, does not constitute a sufficient basis to support a verdict for the plaintiff or the defendant, as the case may be, so that such a verdict, if returned would have to be set aside, the court may and should direct a verdict for the other party."
>
> "A mere scintilla of evidence is not enough to require the submission of an issue to the jury. The decisions establish a more reasonable rule 'that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence,

but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed' * * *. Issues that depend on the credibility of witnesses, and the effect or weight of evidence are to be decided by the jury. And in determining a motion of either party for a peremptory instruction, the Court assumes that the evidence for the opposing party proves all that it reasonably may be found sufficient to establish and that from such facts there should be drawn in favor of the latter all the inferences that fairly are deducible from them * * *. Where uncertainty as to the existence of negligence arises from a conflict in the testimony or cause, the facts being undisputed, fair-minded men may draw different conclusions from them, the question is not one of law but of fact to be settled by the jury. Where the evidence upon any issue is all on one side or so overwhelming on one side as to leave no room to doubt what the fact is, the court should give a peremptory instruction to the jury."

Counsel for appellees also cite the case of Houston etc. R. Co. v. Loeffear (Tex. Civ. App.), 59 S. W. 558, on Page 12 of their brief. We quote further from this opinion at Page 562, believing that the court's language may be helpful in illustrating our position.

"We fully recognize the importance of a strict observance by the courts of the rule that jurors are the exclusive judges of the credibility of witnesses, and of the weight to be given to their testimony, but this rule neither require nor con-

templates that the mind and conscience of a court shall be entirely and unreservedly surrendered to the judgment of a jury upon all questions of fact that may arise in the trial of a case. When the verdict of a jury is so against the weight and preponderance of the evidence as to be clearly wrong, it is the duty of the court to set such verdict aside; and the grave responsibility thus placed upon the judiciary of determining whether or not the evidence in a particular case is legally sufficient to deprive a citizen of his property cannot be evaded.

An attack is made upon a portion of the charge. It was given originally without exception, and when the jury asked for further instructions, it was repeated, again with no exception. It was only after the jury had retired the second time that an exception was taken. This was too late for a valid exception and the district court committed no error in refusing to call the jury back to correct his charge * * *. WHILE WE HAVE POWER TO REVERSE FOR AN ERRONEOUS CHARGE TO WHICH NO EXCEPTION WAS TAKEN, WE SHOULD EXERCISE SUCH POWER ONLY WHEN THE ERROR IS SERIOUS."

Counsel for appellees cite the case of Woody vs. Utah Power & Light Co., 54 Fed. (2d) 220, on Page 23 of their brief. An examination of this case discloses facts not existing in the instant case. We quote:

"The fact that Jessop was an employee of defendant, that the automobile belonged to de-

> fendant, that Jessop used it in performing his duties as such employee and that men under the supervision of Jessop were working in the vicinity of the accident were circumstances from which the inference might be drawn that Jessop was acting within the scope of his employment at the time of the accident."

We presume it is by reason of what is said in this case, as quoted herein that counsel says, Page 23 of appellees brief, after discussing the testimony of Joe Smith, J. W. Gandee, William J. Evans, Harry Davis and W. C. Weaver, on Pages 15 to 25 of their brief, 'to the weight and effect of the above evidence is to be added the inferences logically and reasonably deductible from the facts and circumstances surrounding and preceding the accident, namely: That the truck in question had that night left Tucson for Phoenix in appellant's business (131); that it was proceeding to Phoenix on its usual route of travel at the time and place of the accident (115); that it was loaded with freight admittedly being hauled by appellant in the conduct of its business (115), (131); and that the regular driver, Joe Smith, was present on the truck at the time (129). These are material factors to be considered by the court and jury on the question of agency.' Again, let us point out that counsel for appellees do not rely upon the presumption arising from the proof of ownership of the truck. This observation, however, is aside from the point under immediate discussion. Counsel has, in this quotation pointed out all of the facts and circumstances which he can muster from

which to prove agency or operation of the truck in the busness of appellant, in the course of the employment of Joe Smith; and, we submit, as stated in the case of Challis vs. Wooburn, supra, "the very utmost that can be said of the evidence in this case is that it possibly raises a suspicion."

We most respectfully submit that a fair consideration of the whole of the evidence, can lead but to one conclusion, and that is that there is no liability on the part of appellant and that the trial court erred in not directing a verdict in its favor.

SPECIFICATION OF ERRORS No. III.

This specification is argued in brief of appellant, pages 51 and 52, and in brief of appellees, pages 24, 25 and 26.

Appellees say on page 25 of their brief:

> "We agree, however, that purely impeaching evidence should be restricted in its effect to the credibility of the witness it challenges, and the weight and value to be given his testimony * * *."

Thus appellees and appellant are in accord as to the applicable law. Under this specification then the question is,—does the instruction requested by appellant tell the jury that purely impeaching evidence should be restricted in its effect to the credibility of the witness it challenges and the weight and value to be given his testimony?

The instruction given relative to certain testimony of Harry Davis, relative to alleged statements of

Joe Smith, was, of course, a proper charge, but it was too limited, whereas the instruction in question dealt generally with evidence offered to impeach Joe Smith.

We urge the facts will not warrant the assertion by counsel of appellees in their brief, page 26,

> "* * * the general charge to the jury in these cases carried with it every proposition of law advanced in the requested instruction to which appellant was entitled * * *."

SPECIFICATION OF ERRORS NO. IV.

This specification is argued in brief of appellant, page 52-55 and in brief of appellees, pages 26-36.

Since the filing of appellants' brief the Bill of Exceptions has been amended. In the Bill of Exceptions originally allowed the question of Juror Ford was:

> "Juror Ford: In case the jury finds that the truck was driven by anyone other than Joe Smith, what would be your instructions as to the liability of the defendant?"

The change brought about by the amendment substitutes for the question just quoted the following question:

> "Juror Ford: In case the jury finds that that truck was driven by anyone else, in your opinion what would be your instruction as to the truck?"

No other change in the Bill of Exceptions has been made except with respect to the taking of an exception.

Is there any difference in the meaning of the question as originally included in the Bill of Exceptions and the question now included in the corrected record, when the context and surrounding circumstances are considered? If the qustions are not in meaning the same, then what is meant by the question as certified in the record as corrected? Is it understandable? Does it show that Juror Ford was confused? Does it show that Juror Ford did not understand the Court's instruction?

If the questions mean the same in substance then we care to add nothing to our opening brief. On the other hand, if the question as appears in the record as corrected is not clear not understandable and shows a confusion of the Juror, then we urge the failure of the Court to ascertain what definitely it was upon which Juror Ford desired further advice or instruction is even greater than his failure to answer the question as originally contained in the Bill of Exceptions. Surely this Court will not place its stamp of approval upon a trial Court failing to advise a Juror in answer to a proper question, and if the question as asked was neither clear nor understandable, even more certain it appears to us that this Court will not place its stamp of approval upon a trial Court not ascertaining just what the Juror sought to be enlightened upon, and then appropri-

ately answering the inquiry of the Juror. Surely, we have not reached that point where a Court can waive a Juror aside and direct him to take up his question with the other Jurors.

Under the evidence in this case it was a proper argument for appellant to make that if anyone other than Joe Smith was driving the truck there could be no liability on the part of appellant. Actually, such argument was made. The point was stressed. It was anticipated, the Jury were advised in the argument in behalf of appellant, that the appellant could be liable only in the event the truck was being driven by Joe Smith. It is not then surprising that an alert and intelligent Juror would pointedly inquire of the Court what would be the liability of the defendant if Joe Smith was not driving the truck. If such was not in substance the inquiry of Juror Ford, was not appellant entitled to have the trial Judge ascertain just what the question of the Juror was? If there was any question abiding in the mind of the Court, after the Juror had propounded his question, as to what the Juror's question was or as to what information or instruction the Juror desired, then ought not the Court to have asked the Juror to re-state his question and frankly tell the Juror that he did not understand his question? Instead, the Court, leaving the Juror confused or uninstructed, committed him to the other Jurors for instruction and advice. This, appellant insists, was error highly prejudicial to it.

Appellees cite in their brief on this subject the case of C. E. Kennedy vs. Nathalie Bruce, 5 Tenn.

App. 583, 587, and quote therefrom on pages 32 and 33 of appellees brief. They stop short, however, in the quotation of presenting, as we understand it, the full view of that Court. We quote further from the opinion, page 587:

"The juror stated to the court that the question he had in mind asking was with reference to the interpretation of evidence. There was nothing in the question, as appears from the above, that the juror desired any instruction, or further instruction, on any question of law. The court then said to the jury that after they retired to consider the verdict if they desired any further instructions from the court, that the court would be pleased to give the instruction on whatever point the jury may desire. This statement was made by the court at the time he declined to permit the juror to ask the question with reference to the interpretation to be given certain evidence. The jury was plainly told by the court that after they had retired to the jury room and the jury desired any additional instructions on any point, that the court would be pleased to further instruct them. * * * If the jury desired further instructions on any point, they were told by the court that he would be pleased to give the further instructions if the jury should request it. The jury did not return from the jury room to request further instruction, although they had been specifically invited to do so should they so desire."

In the opinion, the court refers to the case of Duane vs. Garretson, 106 Tenn. 38, 58 S. W. 1063, (decided in 1900), wherein the jury, after

> having retired, returned into court and requested the court to explain a certain part of his charge, saying "that they did not understand it." The court replied that all of the charge was written, whereupon the jury said that they could not read the charge, and the trial judge remarked, "I am not surprised at that. Retire, gentlemen, and consider of your verdict." "* * * On appeal to the Supreme Court it was held that it was the duty of the court under the circumstances of that case, to have read the charge to the jury, or to have given them such instructions as would aid them in understanding the charge. The court said: 'To send them back without aid or instruction, under these circumstances, was to leave them entirely at sea as to the law of the case, and virtually submitting the case to them without a charge, or perhaps worse, with a charge which they could not understand.' This was held to be reversible error."

Appellees, recognizing the seriousness of this error and the prejudices that resulted to the appellant, urge that it should not be considered by the Court, because an exception was not timely taken. The record, as amended, lends some support to the contention that the exception was not timely taken. The circumstances warrant, we urge, a consideration of this assigned error. It has been held that this Court has power to reverse for an erroneous charge to which no exception was taken. U. S. vs. Sprinkle et al, 57 Fed. (2d) 968; U. S. vs. Paddock 79 Fed. (2) 872.

The Court's attention is directed especially to the minute entries of the Clerk of the trial Court of April 12, 1938, appearing in the record as amended because such minute entries show that Counsel for appellant, excepted to the Court's refusal to give instructions it requested, Numbered 3 and 9, and *to the Court's refusal to answer question asked by Juror George O. Ford,* before the jury retired.

In the Court Reporter's notes certified in the corrected record, there is no showing of the time that elapsed, whether it was one second, or a longer time, between the writing of the Reporter that the Jury retired in the custody of the Bailiff and the taking of an exception by Counsel for appellant, to the trial Court's refusal to answer Juror Ford's question. Evidently the trial Court considered the exception timely because the exception was graciously granted.

In view of the circumstances, again we urge a consideration of this assigned error, and especially so when the purpose of an exception is considered. We note from the case of Lee Tung vs. United States, 7 Fed. (2d) 111, 112, as follows:

> "The rule requiring exceptions to be taken before the retirement of the jury is not a technical one. The object of the rule is to give the trial Court an opportunity to correct the charge before the jury retires, or at least before the verdict is returned, thus avoiding the necessity for granting a new trial or for reversal on ap-

peal for errors that might have been corrected at the time of their occurrence."

Furthermore, the record has been corrected under the Rules of Civil Procedure for the District Courts of the United States, which became effective September 1, 1938.

By these rules, exception to a ruling of the trial Court is no longer necessary.—Rule 46.

After providing the effective date of the rules, in Rule 86, it is provided that the rules "govern all proceedings in actions brought after they take effect and also further proceedings in actions then pending, except to the extent that in the opinion of the Court their application in a particular action pending when the rules take effect would not be feasible or would work injustice; in which event the former procedure applies."

Under the rules, we urge, that exception to the Court's refusal to answer Juror Ford's question is unnecessary.

In conclusion, we submit the cases should be reversed, because the District Court failed to direct a verdict in favor of appellant, and that the Dis-

trict Court should be directed to enter a judgment for the appellant, and if this relief be not afforded, in any event a new trial should be directed.

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